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Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~6556~~ 19

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF

WILLIAM W. JUDGE
115 South Palmetto Avenue
Daytona Beach, Florida
and
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Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, James Milford Brazzell, Israel Seawood, Luther Lee Smith, Theodore Roosevelt Goggins, Acordy St. Clair Rimes and Ida Marie Sharpe, pray that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the cause entitled: "James Milford Brazzell, Israel Seawood, Luther Lee Smith, Theodore Roosevelt Goggins, Acordy St. Clair Rimes and Ida Marie Sharpe vs. United States of America" No. 22,669

of the docket of said Court, which judgment was entered on the 27th day of June, 1966 (Record II., Page 518), and as to which a rehearing was denied on the 13th day of September, 1966 (Record II., Page 524).

CITATION TO OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in this case was rendered on the 27th day of June, 1966 (Record II., Page 514).

JURISDICTION

The judgment of the Court of Appeals, Fifth Circuit, was entered on the 27th day of June, 1966, and timely application for rehearing was filed on the 18th day of July, 1966 (Record II., Page 519). Rehearing was denied by said Court on the 13th day of September, 1966 (Record II., Page 524, and stay of mandate was granted through the 13th day of September, 1966.

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254, sub-section 1, and Rule 38 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

DID THE FEDERAL OFFICERS, UPON THE PRETEXT OF ARREST WARRANTS, EFFECT ENTRY INTO 636 PALMETTO STREET, EUSTIS, FLORIDA, FOR THE PRIMARY PURPOSE OF A GENERAL SEARCH AND SEIZURE, CONTRARY TO LAW?

STATEMENT OF THE CASE

In November 1, 1962, HONORABLE BRYAN SIMPSON, United States District Judge for the Middle District of Florida, issued a search warrant, directed to Special Agent FRED SCHILLING, or any other Special Agent of the Internal Revenue Service, Treasury Department of the United States of America, authorizing and directing a search of the dwelling house of one of the Appellants herein, LUTHER LEE SMITH, located at 715 Palmetto Street, in the City of Eustis, Florida, in the Middle District of Florida (see Government's Exhibit No. 13 and Record 149-150). The mentioned search warrant was executed on November 10, 1962, at which time certain gambling paraphernalia and money was seized from the dwelling of Appellant, LUTHER LEE SMITH (see return to search warrant attached to Government's Exhibit No. 13).

The search warrant above referred to recites the substance of its supporting affidavits made by one JESSE S. BURROW, LEWIS McCALL and Special Agent FRED SCHILLING, purporting to show probable cause to believe Appellant, LUTHER LEE SMITH, was using his home place at 715 Palmetto Street, Eustis, Florida, as the means of conducting certain criminal offenses in violation of pertinent Wagering Excise Tax Laws of the United States of America, to-wit: "Cuba" or "Bolita." The original affidavits for this search warrant were attached to the search warrant admitted in evidence (see Government's Exhibit No. 13).

On the same date that the above mentioned search warrant was issued, that is, November 1, 1962, HON-

ORABLE BRYAN SIMPSON, upon complaint of Special Agent FRED SCHILLING, issued at least two arrest warrants, one for Appellant, LUTHER LEE SMITH, and the other for Appellant, ISRAEL SEAWOOD, in which each of them was charged with Federal wagering, stamp and excise tax lottery sales violations (see Government's Exhibits Nos. 14 and 15).

On November 10, 1962, and elaborate surveillance apparatus and organization was set up by Special Agent FRED SCHILLING, together with a number of Federal and State officers in Eustis, Florida, and close attention was paid to observing the home of Appellant, LUTHER LEE SMITH, at 715 Palmetto Street, Eustis, Florida. It came to the attention of Special Agent FRED SCHILLING that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, and others, had left 715 Palmetto Street and converged upon and went into a dwelling house located at 636 Palmetto Street in Eustis, Florida. Special notice is drawn to the fact that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, were observed by the offioers as they left 715 Palmetto Street and went to and entered 636 Palmetto Street, along with others. Further special attention is directed to the fact that Special Agent FRED SCHILLING was not personally acquainted with Appellant, LUTHER LEE SMITH, or Appellant, ISRAEL SEAWOOD (Record 199). Apparently Special Agent FRED SCHILLING depended upon information given him by Undercover Agent LEWIS McCALL, who allegedly had purchased Bolita tickets from them, for information necessary to identify Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD.

Special Agent FRED SCHILLING, accompanied by Undercover Agent LEWIS McCALL, went to the front door of the dwelling located at 636 Palmetto Street; other Federal and State officers accompanied them. They entered after knocking and announcing themselves as "Federal officers" and that they "had warrants." Upon entry of the home at 636 Palmetto Street, in Eustis, Florida, Appellants, LUTHER LEE SMITH, ISRAEL SEAWOOD, JAMES MILFORD BRAZZELL, one CARL D. PURSER and one ARTHUR MARTIN, were arrested. PURSER and MARTIN died pending subsequent prosecution (Record 21). Gambling, lottery, paraphernalia, money, and other personal property were seized by the officers at the time of the search of 636 Palmetto Street, as a purported incident to the lawful arrest of Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD.

Following the raid at 636 Palmetto Street in Eustis, Florida, the officers then proceeded to 715 Palmetto Street, the home of Appellant, LUTHER LEE SMITH, and executed the search warrant there at a time when Appellant, LUTHER LEE SMITH, was in custody of the officers. The search of the home of Appellant, LUTHER LEE SMITH, at 715 Palmetto Street, produced further articles of gambling, lottery, paraphernalia and monies, all of which were seized.

Subsequently, sometime in 1963, PURSER, MARTIN, BRAZZELL, LUTHER LEE SMITH, RIMES, BROOKER, NELSON, BETHEL, SHARPE and GOGGINS were indicted by the Grant Jury of and for the Middle District of Florida, being case No. 62-32-Cr-Oc, in which all of the Defendants were, in the First Count, charged with conspiracy with violation of pertinent lottery

wagering statutes proscribed in and by Title 26, United States Code (see Supplementary Record 26). Later that Indictment was voluntarily dismissed by the Government and the instant Indictment, case No. 64-6-Cr-Oc, was returned by a Grand Jury for the Middle District of Florida, Ocala Division, on March 17, 1964, and containing 14 Counts (Record 1, et seq). The present Indictment charges, in the First Count, all of the Appellants here and the then living CARL D. PURSER and ARTHUR MARTIN, with conspiracy to violate Section 371, Title 18, United States Code, by wilfully engaging in the business of accepting wagers knowingly and wilfully attempting to evade and defeat the special occupational tax; failing to pay the occupational tax to the District Director of Internal Revenue; failing to register with the District Director; attempting to conceal from the proper officers of the United States their being engaged in the business of accepting wagers, all in violation of Title 26, United States Code, Section 7201, and other substantive offenses, proscribed in and by Title 26, United States Code, Sections 7201 and 7202.

Counts Two, Three and Four of said Indictment charged PURSER with substantive offenses against the Lottery Excise Tax Laws of the United States; Count Five likewise charged ARTHUR MARTIN with such substantive violations. Counts Six to Fourteen, both inclusive, are identical in form and specifically charge the respective individual Defendants, Appellants here, to-wit: BRAZZELL, SEAWOOD, LUTHER LEE SMITH, GOGGINS, RIMES, BROOKER, NELSON, BETHEL and SHARPE, with the substantive offense of receiving wagers as defined by Section 4421, Internal Revenue Code of 1951, for and on behalf of a

person subject to the excise tax imposed by Section 4401 of said Internal Revenue Code on persons engaged in the business of accepting wagers, and wilfully and knowingly attempting to evade and defeat the special occupational tax by failing to register with and failing to pay the said occupational tax to the District Director of Internal Revenue, and attempting to conceal their alleged business of receiving wagers on behalf of a person subject to the excise tax imposed by Section 4401 of said Internal Revenue Code, in violation of Title 26, United States Code, Section 7201 (see Record 1, et seq).

By Stipulation, Motions to Dismiss the Indictment, Motions for Return of Seized Property and to Suppress Evidence, Motions for Bills of Particulars, and Motion for Discovery and Inspection, directed to the first Indictment, were permitted to stand over and be addressed to the instant Indictment (Supplementary Record 26). The individual Motions to Dismiss are found beginning at page 1 to page 13, both inclusive, of the Supplementary Transcript of Record. All of the Defendants joined in moving to dismiss the First Count, the conspiracy count, for the causes and reasons therein stated (see Supplementary Record 13).

Two Motions for Return of Seized Property and to Suppress Evidence were filed. The first was presented by Appellant, LUTHER LEE SMITH, and is particularly concerned with and challenges the validity of the search warrant authorizing the search of SMITH'S home located at 715 Palmetto Street in Eustis, Florida (see Supplementary Record 15). The second Motion, for return of seized property and to suppress evidence, was filed by the original Defendants, PURSER, MAR-

TIN, BRAZZELL, SEAWOOD and SMITH, the latter three being the only living Defendants, Appellants here. This Motion to Suppress asserts that the search of 636 Palmetto Street is in violation of law in that the same violated the right of said Appellants, guaranteed to them under the Fourth Amendment to the Constitution of the United States of America to be free from unreasonable searches and seizures as proscribed in the Fourth Amendment, and because the Federal officers knowingly, wilfully and deliberately utilized purported arrest warrants as a pretext for a general search of said premises contrary to law (see Supplementary Record 17).

The Motions to Dismiss and to Suppress were all denied by the Trial Judge.

The trial came on to be heard before HONORABLE WILLIAM A. McRAE, without a Jury; Jury trial being appropriately waived (see Record 24, et seq), on the 17th day of February, 1965, at Jacksonville, Florida.

Upon the close of all the evidence, the Defendants moved the Trial Judge to suppress all of the Government's exhibits introduced and filed in evidence (Record 48, et seq), and after considerable argument the Trial Judge entered his Order denying said Motions (Record 455). Thereupon the Trial Judge entered judgments and commitments finding the Defendants, Appellants here, BRAZELL, SEAWOOD, SMITH, GOGGINS, RIMES and SHARPE guilty as charged under the First Count, the conspiracy Count, and sentenced them, and each of them, to a year and a day (Record 458, et seq).

On May 31, 1965, Appellants, BRAZZELL, SEAWOOD, SMITH, GOGGINS, RIMES and SHARPE filed their respective Notices of Appeal to this Honorable Court from the United States District Court for the Middle District of Florida (Record 467, et seq). Appellants were allowed bail pending appeal (Record 473, et seq).

The United States Court of Appeals, Fifth Circuit, on June 27, 1966, by Per Curiam opinion (Record II., Page 514), held that the search and seizure following entry by the Federal officers into 636 Palmetto Street, was incidental to lawful arrest, and cited: *United States v. Rabinowitz,* 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653).

It was the contention of Petitioners, in and by their Petition for Rehearing (Record II., Page 519), that the Court of Appeals, Fifth Circuit, erroneously failed to apply the rule laid down in *United States v. Rabinowitz, supra,* and in *McKnight, et al v. United States,* (USCA DC) 183 F. 2d 977), in the particulars specifically set out in grounds two and three of the Petition for Rehearing (Record II., Pages 521-522).

ARGUMENT

DID THE FEDERAL OFFICERS, UPON THE PRETEXT OF ARREST WARRANTS, EFFECT ENTRY INTO 636 PALMETTO STREET, EUSTIS, FLORIDA, FOR THE PRIMARY PURPOSE OF A GENERAL SEARCH AND SEIZURE, CONTRARY TO LAW?

The evidence of the Government itself affirmatively

discloses that the entry by Federal officers into 636 Palmetto Street, Eustis, Florida, upon purported authority of arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, was in truth and in fact a pretext for or, in the alternative, was primarily for the purpose of, effecting a general search of 636 Palmetto Street without a search warrant, contrary to law.

To begin with, though the factual circumstances are dissimilar, the case of *United States of America v. Lefkowitz*, 285 U.S. 452, 76 L.Ed. 877, is positive authority for the proposition, as stated by Mr. Justice Butler in the last paragraph of that decision of the Supreme Court of the United States, that:

> "An arrest may not be used as a pretext to search for evidence."

It is necessary briefly to recount the circumstances involved. It will be recalled that the search warrant and the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, were issued by the HONORABLE BRYAN SIMPSON, United States Judge, on November 1, 1962 (see Government's Exhibits 13, 14 and 15, and Record 149-150).

Any casual reading of the testimony of Special Agent FRED SCHILLING, commencing at page 123 of the Record, will clearly show that he, together with a number of other officers, Federal and State, had conducted, prior to November 1, 1962, an intensive investigation and surveillance in Eustis, Florida, designed and organized to apprehend a lottery operation that was being conducted in that area. According to the

search warrant, the investigation referred to had its beginning sometime during the month of September 1962, and it continued progressively until November 1, 1962, when the search warrant and the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD were obtained. It is obvious that for reasons which Special Agent FRED SCHILLING deemed necessary in order to effect the arrest of as many of the parties involved as possible, the arrest warrants were deliberately left unexecuted for some 10 days. In other words, it is plain that the Government agents certainly were in no wise prevented from arresting Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD during the interim period between November 1st and November 10th, 1962. But, when the officers were in position and location at various vantage points on November 10, 1962, and in communication with each other by radio, it developed that their quarries were not going to assemble at 715 Palmetto Street, the home of LUTHER LEE SMITH, Appellant, but instead were going to 636 Palmetto Street, a dwelling house some distance away from the home of Appellant, LUTHER LEE SMITH. This, of course, presented to Special Agent FRED SCHILLING, who apparently was in charge of the array of police officers involved, what he considered to be an emergency, that is to say, the plans he had laid so carefully for the search of 715 Palmetto Street went awry.

It should be pointed out and clearly understood that there was nothing to prevent Special Agent FRED SCHILLING, and his officers, from arresting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD *before* they reached 636 Palmetto Street, or to prevent him from executing the search warrant at 715 Palmetto

Street before going to 636 Palmetto Street. Special Agent FRED SCHILLING simply did not choose to follow that course. It is also to be noted that in view of the long standing surveillance and investigation under the supervision of Special Agent FRED SCHILLING, the Government's evidence discloses absolutely no reason why the "emergency" which confronted him on November 10th was not resolved by the simple process of delaying springing his trap until he obtained a search warrant for 636 Palmetto Street, just as he had done in the case of the search warrant for LUTHER LEE SMITH'S home at 715 Palmetto Street.

The purpose of mentioning the foregoing circumstances is to point up and emphasize the irresistible conclusion that Special Agent FRED SCHILLING resolved to utilize the arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, for the purpose of entering 636 Palmetto Street and "Catching" all of those whom his officers informed him had gathered there. To say that Special Agent FRED SCHILLING was not primarily concerned with entering and searching 636 Palmetto Street and arresting all of its inmates is to defy all of the circumstances the record in the case at bar so clearly show (Record 193).

First of all, Special Agent FRED SCHILLING was not acquainted with and could not identify Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD, himself (see Record 199). He, Special Agent, FRED SCHILLING, was, therefore, required to depend upon his undercover informer, Agent LEWIS McCALL, in order to identify the two men for whom he possessed arrest warrants. Consequently, LEWIS McCALL accom-

panied Special Agent FRED SCHILLING to the front door at 636 Palmetto Street (see Record 198). He, SCHILLING, then knocked on the door, and claims he identified himself and stated that he possessed arrest warrants for Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD. The point is, however, and this is the crucial one, since Special Agent FRED SCHILLING could not identify either of the Appellants, LUTHER LEE SMITH or ISRAEL SEAWOOD, he obviously was compelled and required to have the door opened for the purpose of permitting his undercover agent McCALL to identify or point out LUTHER LEE SMITH and ISRAEL SEAWOOD to him. There is no escaping the fact that Special Agent FRED SCHILLING depended upon information funnelled to him that Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD had entered 636 Palmetto Street, and since he himself could not identify them, it became absolutely necessary for Special Agent FRED SCHILLING to have his informer McCALL at his side to identify Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, in order to execute the warrants he possessed.

One of the occupants, ARTHUR MARTIN, now dead, opened the door and upon inquiry by Special Agent FRED SCHILLING as to the whereabouts of Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, MARTIN pointed to a man standing in the kitchen (see Record 201). Thereafter, of course, the raid was accomplished, the search made, the lottery paraphernalia and equipment seized, and PURSER, now dead, and Appellants, BRAZZELL, SMITH and SEAWOOD were arrested (Record 196-199).

The conduct of Special Agent FRED SCHILLING, and the other officers, was a blatant and flagrant disregard of the constitutional rights of the Appellants, BRAZZELL, SMITH and SEAWOOD, under the Fourth Amendment. We think the unconscionable violation of the Fourth Amendment to the Constitution of the United States by the Federal officers at 636 Palmetto Street, is controlled by the case of *McKnight, et al v. United States*, 185 F. 2d 977 (U.S.C.A.D.C.), and the case therein cited. The only difference between *Mcknight* and the case at bar is that in *McKnight* the officers broke in after they had knocked at the door, but the circumstance of breaking the door was not the controlling factor which destroyed the legal efficacy of the search and seizure in *McKnight*. The United States Court of Appeals for the District of Columbia in *McKnight* said this:

> *"The police planned to and did reject a convenient present opportunity to make a lawful arrest in a public street* and, without a search warrant or enough information to get one, broke into a house in order to seize evidence they hoped to find there. They found it and seized it. *We think this is a plain violation of the prohibition in the Fourth Amendment of the Constitution against unreasonable* searches and seizures. The government argues that what it aptly calls a 'police strategem,' waiting until McKnight was in a locked house before arresting him, justified the police in breaking into the house in order to arrest him and seize evidence. We think this untenable. 'The right to break open a door to make an arrest requires something more than the mere right to ar-

rest.' The government concedes that even when officers have a warrant of arrest they may not break open doors unless there is some degree of necessity. To execute the warrant for McKnight's arrest there was no necessity to break open doors; or, what comes to the same thing for legal purposes, none but what the officers themselves created. *As in the case of Accarino, 'It would appear that the officers deliberately let him get to his own front door before they attempted to approach.* If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers.' Neither policemen nor private citizens can justify breaking into a house, or other violence, by deliberately creating an alleged necessity for it. Since McKnight's arrest was accomplished by a needless and violent invasion of a private house, it was illegal, *particularly since the real purpose of the invasion was not an arrest but a search.*

"The Supreme Court has specifically held that 'An arrest may not be used us a pretext to search for evidence.' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L. Ed. 877, 85 A.L.R. 775. In upholding the search in the Harris case the Court pointed out that it was not 'a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some

> crime.' Harris v. United States, 331 U.S. 145, 153, 67 S.Ct. 1098, 1102, 91 L.Ed. 1397. *It is settled law that 'when it appears, as it does here, that the search and not the arrest was a pretext for or at the most an incident of the search,' the search is not reasonable within the meaning of the Constitution.* Henderson v. United States, 4 Cir., 12 F.2d 528, 531, 51 A.L.R. 420," (italics supplied).

In the case at bar it is fatuous to say, just as it was in *McKnight, supra*, that Special Agent FRED SCHILLING did not reject a convenient present opportunity to make a lawful arrest in a public street. He purposely declined that opportunity; he wanted Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to gather with the others inside the house where he suspected a lottery check-up would be in progress so that he could enter and search the dwelling. Just as in *McKnight, supra*, the Government in the case at bar argued that Special Agent FRED SCHILLING used a 'police strategem' by permitting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to enter 636 Palmetto Street before he undertook to execute the arrest warrant. Just as in *McKnight, supra*, it is crystal clear that Special Agent FRED SCHILLING deliberately permitted and allowed Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, to enter 636 Palmetto Street before he resolved to approach it and enter it upon the pretext of executing his arrest warrants.

In *McKnight, supra*, the Court there particularly made reference to *United States v. Lefkowitz, supra*, and as the quotation from the opinion in *McKnight, supra*, states, law-enforcement officers entering prem-

ises ostensibly for the purpose of making an arrest but in *reality* for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime, is in violation of the Fourth Amendment to the Constitution of the United States, as held in *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1397, cited in *McKnight, supra*.

It is interesting to note that when counsel was arguing this very point to the Trial Judge below (Record 423) the Trial Judge asked counsel for Appellants the following question:

> "Suppose the search as well as the arrest were equally significant and important; then where do we end up?"

Counsel for Appellants answered the Trial Judge's question by saying:

> "My position would be this, Your Honor. That if it were possible that there could be two co-equal propositions that it ought to be, and necessarily must be, resolved against the Government, because of the necessity . . . and the academic requirement that the Government, or any other governmental agency, when it undertakes to make a search, and even if it be an aspect of their purpose, must satisfy the constitutional requirements or suffer the consequences." (Record 424).

The Trial Judge, of course, disagreed with counsel for Appellants. We think he was fundamentally wrong.

We insist that the Trial Judge was in grave error because there are absolutely no factual circumstances in the evidence adduced by the Government to dispute the fact that Special Agent, FRED SCHILLING, was not concerned with arresting Appellants, LUTHER LEE SMITH and ISRAEL SEAWOOD, but was primarily concerned with effecting an entrance into 636 Palmetto Street for the purpose of making a search. On the contrary, every single facet of the evidence discloses beyond peradventure that the only purpose of Special Agent FRED SCHILLING in going to 636 Palmetto Street at all was to enter and search it, and he used the fiction of an arrest warrant to do that which the mandate of the Fourth Amendment to the Constitution of the United States plainly and unequivocally denies to him.

Of course, without the search and seizure made in 636 Palmetto Street, and the fruits it produced, together with the search of 715 Palmetto Street and its fruits, the Government would have had no case and necessarily there could have been no conviction.

CONCLUSION

We respectfully submit that the conviction of the Appellants before this Honorable Court is predicated solely and only upon the utilization of evidence procured and seized by Government agents in direct and flagrant violation of the Fourth Amendment to the Constitution of the United States, and the Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM W. JUDGE
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and
OLLIE LANCASTER, JR.
122 Madison Avenue
Daytona Beach, Florida
Attorneys for Petitioners

PROOF OF SERVICE

I HEREBY CERTIFY that I am counsel for Petitioners in the foregoing Petition for a Writ of Certiorari, that I am a member of the Bar of the Supreme Court of the United States and that on this day I served copies of the foregoing Petition for Writ of Certiorari upon the Solicitor General of the United States, and upon the District Attorney for the United States District Court, Middle District of Florida, by mail, postage prepaid, addressed to their respective offices.

New Orleans, La., October _____, 1966.

Of Counsel for Petitioners

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22,669

D. C. Docket No. 64-6-Criminal Action

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 27, 1966

*William Harold Cox
United States District Judge
for the Southern District of
Mississippi, sitting by designation.

APPENDIX B

(738a) Cox

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22,669

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Middle District of Florida

(September 13, 1966)

Before WISDOM and THORNBERRY, Circuit Judges, and COX,* District Judge.

PER CURIAM.

The appellants petition for rehearing in reliance upon *United States v. Rabinowitz*, 339 US 56, 70 S.Ct. 430, 94 L.Ed. 653 and *McKnight v. United States*, 183 F.2d 977 is without merit under the totally different

facts and circumstances in this case and is, therefore, DENIED.

*William Harold Cox, United States District Judge for the Southern District of Mississippi, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22,669

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES and IDA MARIE SHARPE,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate

of this Court in said cause be and the same is stayed for a period of thirty days from September 13, 1966, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from September 13, 1966, there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from September 13, 1966, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ HAROLD COX
United States District Judge.

Dated: Sept. 20, 1966